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No. 94-766

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IN THE

Supreme Court of the United States

October Term, 1994

EUGENE H. DUFFY, *et al.*,

Petitioners,

against

JAMES W. WETZLER, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT APPELLATE DIVISION --

BRIEF FOR RESPONDENTS WETZLER, CHU AND REGAN IN OPPOSITION

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Questions Presented

1. Whether the court below complied with the mandate of this Court to reconsider its prior decision in light of *Harper v Virginia Department of Taxation.*

2. Whether the decision of the court below denying relief under 42 USC § 1983 violates the Supremacy Clause.

3. Whether the decision of the court below denying class action certification and attorneys' fees under the common fund doctrine conflicts with this Court's decisions by depriving taxpayers of meaningful relief required by the Due Process Clause.

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT APPELLATE DIVISION --

Brief for Respondents Wetzler, Chu and Regan in Opposition

Opinions Below

The opinion of the New York State Supreme Court, Appellate Division (Pet App 1a-4a) is reported at ____ AD2d

____, 616 NYS2d 48 (2d Dept August 8, 1994) ("Duffy II"). The New York State Court of Appeals' denial of petitioner's motion for leave to appeal (Pet App 46a) is reported at 84 NY2d 838, 617 NYS2d 129, 641 NE2d 149 (Sept. 1, 1994).

Previously, the Appellate Division had issued a decision (Pet App 7a-24a), reported at 174 AD2d 253, 579 NYS2d 684 ("Duffy I"), affirming in part and reversing in part a decision of the Supreme Court of the State of New York, Queens County. The opinion of the New York State Supreme Court, Queens County (Pet App 25a-38a), is reported at 148 Misc 2d 459, 555 NYS2d 543. The orders of the New York State Court of Appeals dismissing petitioners' appeal in *Duffy I* (Pet App 51a-52a) and denying petitioners' motion for leave to appeal *Duffy I* (Pet App 53a-54a) are reported respectively at 79 NY2d 976, 583 NYS2d 190, 592 NE2d 798, and 80 NY2d 890, 587 NYS2d 900, 600 NE2d 627 (1992). This Court, in its order dated June 28, 1993 (Pet App 45a), reported at ____ US ____, 113 S Ct 3027, 125 L Ed 2d 716, had granted the prior petition for certiorari to the Appellate Division in *Duffy I*, vacated that judgment, and remanded the case to the Appellate Division for further consideration in light of *Harper v Virginia Department of Taxation*, 509 US ____, 113 S Ct 2510, 125 L Ed 2d 74 (1993).

Jurisdiction

The decision and order of the Appellate Division was entered on August 8, 1994. The denial by the New York State Court of Appeals of petitioners' motion for leave to appeal pursuant to sections 5602(a)(1)(i) and 5514(a) of the New York Civil Practice Law and Rules was dated Septem-

ber 1, 1994. The jurisdiction of this Court is invoked under 28 USC § 1257(a).

Statement of the Case

This case stems from this Court's decision in *Davis v Michigan Department of Treasury*, 489 US 803 (1989), holding that state income tax laws which exempt from taxation retirement benefits paid by the state or its political subdivisions while taxing retirement benefits paid by all other employers including the federal government violates the principles of intergovernmental tax immunity embodied in 4 USC § 111. New York immediately acted to conform its tax laws to the *Davis* ruling, amending section 612(c)(3) of the Tax Law to exclude from taxation pensions paid to former officers and employees of the federal government. L 1989, ch 664, §§ 1, 2. The amendment was made applicable to federal pension benefits received in taxable years beginning on or after January 1, 1989. L 1989, ch 664, § 3.[1] Petitioners in this case seek declaratory, injunctive and monetary relief for taxes paid on federal pensions prior to 1989.

In June of this year, in light of this Court's decision in *Harper v Virginia Department of Taxation*, 509 US ____, 113 S Ct 2510, 125 L Ed 2d 74 (1993), which held that *Davis* must be applied retroactively, and in view of changes in New York's fiscal situation, the Governor of New York announced that the State would pay full refunds plus interest to the approximately 10,000 federal retirees who had filed timely administrative claims for refunds for the years 1985

[1]Corresponding provisions in section 11-1712(c)(3) of the New York City Administrative Code were also amended to conform to the *Davis* ruling.

through 1989.[2] As the Appellate Division held, the State's decision to pay these refunds rendered academic the principal issues of retroactivity and remedy which had been litigated throughout this case. Petitioners now seek a writ of certiorari primarily as a further step in their quest for attorneys' fees. While they ostensibly raise other arguments that New York's procedures violate Due Process and Supremacy Clause principles, these other arguments are plainly meritless. As the following discussion shows, there is no reason for this Court to grant petitioner's application for a writ of certiorari.

Two months after this Court decided *Davis*, petitioners commenced this action against various New York State and City officials, and the City of New York, in New York Supreme Court, Queens County, seeking declaratory, injunctive and monetary relief under state and federal law. In their second amended complaint, petitioners alleged as a first cause of action under 42 USC § 1983 that the pre-1989 New York State and City tax laws violated their rights under 4 USC § 111, principles of intergovernmental tax immunity, and the Due Process and Equal Protection Clauses of the United States Constitution. As a second cause of action, petitioners sought a declaration that section 612(c)(3) of the Tax Law and section 11-1712(c)(3) of the New York City Administrative Code violated these same constitutional and statutory provisions. As a third cause of action, petitioners sought an injunction against the State and City respondents to prevent them from continuing to collect taxes on federal pensions for the years 1986 through 1989. Petitioners al-

[2]Under New York Tax Law § 687, a taxpayer must file an administrative claim for a refund within three years of the time of filing the taxpayer's return or two years from the time the tax was paid, whichever occurs later.

leged as a fourth and final cause of action that the City of New York is liable for monies had and received. Petitioners also sought class certification. Respondents duly answered and interposed various defenses. Petitioners moved for partial summary judgment on their second cause of action for declaratory relief and renewed a prior application for class certification. Both the State and City respondents cross-moved for summary judgment dismissing the complaint taking the position that *Davis* should be given only prospective effect.

In its Memorandum Decision dated April 10, 1990, Supreme Court, Queens County, reasoned that, regardless of whether *Davis* is to be applied retroactively, New York State law requires refunds (Pet App 31a-33a, 148 Misc 2d 459, 465-66, 555 NYS2d 543, 546-48). The court granted judgment in favor of petitioners declaring that the City and State personal income tax scheme which taxed federal pension benefits received prior to January 1, 1989, while exempting from taxation State and local pension benefits, was discriminatory, invalid and unconstitutional in light of *Davis*, and that petitioners are entitled to refunds of personal income taxes paid on federal pension benefits for the years 1986 through 1988, provided that they file for refunds and meet the procedural requirements for refunds under the Tax Law (Pet App 37a, 148 Misc 2d at 470, 555 NYS2d at 550).[3] The court also enjoined respondents from assessing and collecting personal income taxes on federal pension benefits received in the years 1986 through 1988 and from interfering with petitioners' rights to file for a refund of personal

[3]The State respondents dispute that petitioners, "on behalf of themselves and all others similarly situated, have satisfied all procedural requirements imposed by the New York Tax Law", as asserted in the Petition, page 6, note 3.

income taxes paid on federal benefits for the years 1986 through 1988 (Pet App 35a-36a, 148 Misc 2d at 470, 555 NYS2d at 550).

The court, however, granted respondents' motion to dismiss petitioners' first cause of action for monetary relief under 42 USC § 1983 on the ground that petitioners failed to show that the named State and City respondents had personally engaged in any civil rights violation (Pet App 34a-35a, 148 Misc 2d at 467-69, 555 NYS2d at 548-49). The court also dismissed petitioners' fourth cause of action against New York City for monies had and received because petitioners failed to comply with a State law protest requirement (Pet App 36a-38a, 148 Misc 2d at 469-70, 555 NYS2d at 549-50). Finally, the trial court denied petitioners' motion for class certification because under New York law class relief is generally inappropriate where governmental actions are involved and subsequent petitioners will be adequately protected under the doctrine of *stare decisis* (Pet App 29a-31a, 148 Misc 2d at 464-65, 555 NYS2d at 546). An order and judgment was entered accordingly on June 26, 1990 (Pet App 39a-44a). By order dated October 1, 1990, and entered October 5, 1990, the court denied petitioners' post-judgment motion for attorneys' fees under the common fund doctrine.

On appeal and cross appeals, the Appellate Division issued its Opinion and Order in *Duffy I* on January 15, 1992, reported at 174 AD2d 253, which modified the order and judgment of Supreme Court, Queens County, by deleting those portions of that order and judgment which granted petitioners' declaratory and injunctive relief and, as so modified, affirmed it. The court held that New York law does not require refunds absent an antecedent determination that

Davis is to be applied retroactively (Pet App 13a, 174 AD2d at 258, 579 NYS2d at 687). It then ruled that the appropriate analysis of the prospectivity issue was governed by *Chevron Oil Co. v Huson*, 404 US 97 (1971) (Pet App 13a-20a, 174 AD2d at 259-64, 579 NYS2d at 687-691). Applying the three-pronged *Chevron Oil* analysis, the court held that *Davis* should be given only prospective effect (Pet App 20a, 174 AD2d at 264-65, 579 NYS2d at 690-691).

The Appellate Division expressly rejected for independent reasons petitioners' cross appeal with regard to § 1983 relief and class certification. It agreed with the lower court's rationale for dismissing the cause of action for damages under 42 USC § 1983, adding that, in any event, respondents are protected by the doctrine of qualified immunity (Pet App 22a-23a, 174 AD2d at 266, 579 NYS2d at 691-692). The court also agreed that class certification was properly denied because where governmental actions are involved subsequent petitioners are adequately protected under the doctrine of *stare decisis* and because a claim for tax refund is personal to the taxpayer and does not constitute a protest on behalf of each member of the proposed class, *citing*, *Matter of Crociata v State Tax Commn.*, 133 Misc 2d 855, 508 NYS2d 842 (Sup Ct Albany Co 1986), *affd on other grnds*, 134 AD2d 112, 523 NYS2d 923 (3d Dept), *affd*, 73 NY2d 726, 535 NYS2d 592, 532 NE2d 98 (1988); *Conklin v Town of Southampton*, 141 AD2d 596, 529 NYS2d 517 (2d Dept 1988) (Pet App 22a-23a, 174 AD2d at 266-267, 579 NYS2d at 691-692). The Appellate Division also affirmed the lower court's post-judgment order denying attorneys' fees under the common fund doctrine (Pet App 23a, 174 AD2d at 267, 599 NYS2d at 692).

By order dated April 7, 1992, the New York Court of Appeals *sua sponte* dismissed petitioners' appeal taken as of right pursuant to New York CPLR 5601(b)(1) (Pet App 51a-52a, 79 NY2d 976, 583 NYS2d 190, 592 NE2d 798). By order dated July 7, 1992, the Court of Appeals denied petitioners' application for leave to appeal pursuant to New York CPLR 5602(a)(1)(i) and 5514(a) (Pet App 53a-54a, 80 NY2d 890, 587 NYS2d 900, 600 NE2d 627).

Petitioners then filed a petition for certiorari in this Court. While that petition was pending, the Court rendered its decision in *Harper v Virginia Department of Taxation*, 509 US ____, 113 S Ct 2510, 125 L Ed 2d 74 (1993), holding that as a matter of federal law *Davis* must be given retroactive effect. While the Court in *Harper* reversed the Virginia Supreme Court's decision on that ground, it refused to enter judgment for the taxpayers "because federal law does not necessarily entitle them to a refund." The Court, therefore, remanded the case to the Virginia Supreme Court "for further proceedings not inconsistent" with its opinion. 113 S Ct at 2520, 125 L Ed 2d at 89.

Accordingly, in response to the petition for certiorari in this case, the Court on June 28, 1993, vacated the Appellate Division's decision that *Davis* should be applied prospectively only and remanded the case "for further consideration in light of *Harper*" (Pet App 45a, 113 S Ct 3027, 125 L Ed 2d 716). The Court issued its mandate on July 28, 1993.

Although respondents on remittitur initially continued to litigate the issue of remedy, on June 27, 1994, the State announced that it would "pay full refunds plus interest to the approximately 10,000 federal retirees who paid State

income taxes on their federal pensions prior to 1989 pursuant to tax provisions that were later held to be unconstitutional under [*Davis* and *Harper*] and who have filed timely administrative claims for refunds with the Department of Taxation and Finance".

As a result, the Appellate Division, in its decision and order dated August 8, 1994, from which petitioners seek a writ of certiorari, dismissed respondents' appeals, writing, "the issues affected by the remittitur of the United States Supreme Court for further consideration in light of *Harper*, i.e., those relating to remedy and the potential refunds, are academic" (Pet App 4a, 616 NYS2d at 50). The Appellate Division also dismissed petitioners' cross appeals, writing, "[petitioners'] contentions regarding the remaining issues, including class action certification and common fund attorneys' fees, were previously rejected by this court in *Duffy I*, and need not be reexamined" (Pet App 4a, 616 NYS2d at 50).[4]

Petitioners then filed and served a motion for leave to appeal to the New York Court of Appeals, along with a motion for a preliminary injunction. By order dated August 18, 1994, Judge Bellacosa granted petitioners' application

[4]On the same date, by separate decision and order, the Second Department recalled and vacated its prior order dated July 19, 1994, which had granted plaintiffs' attorneys' application for a temporary restraining order, aimed primarily at protecting their rights to attorneys' fees, enjoining the State from paying more than 80% of the individual refund claims, and ordered that the issues regarding the attorneys' right to fees from the named plaintiff clients who had retained them and the existence of any charging lien under New York Judiciary Law § 475 be set down for hearing in Supreme Court, Queens County.

for temporary injunctive relief, which was again aimed primarily at protecting their rights to attorneys' fees, enjoining the State from paying any refunds, pending review by the full court (Pet App 57a-59a). On September 1, 1994, the New York Court of Appeals denied petitioners' motion for leave to appeal and vacated its previously issued temporary restraining order (Pet App 46a). This Court twice denied petitioners' applications for a stay pending a decision on the petition for writ of certiorari (Pet App 60a-61a).

REASONS FOR DENYING THE WRIT

By paying full refunds plus interest to the approximately 10,000 federal retirees who filed claims with the New York Department of Taxation and Finance for refunds for State income taxes paid on their federal pension within the three-year period prescribed by New York Tax Law § 687, New York has satisfied the dictates of *Davis* and *Harper*. The issues related to 42 USC § 1983 were correctly decided in accordance with settled federal law. The remaining issues regarding class certification and common fund attorneys' fees are issues of state law which were correctly decided by the Appellate Division and in no way implicate federal constitutional protections. Thus, there is no reason for this Court to grant the writ.

Before discussing the reasons for denying the writ, respondents briefly address petitioners' factual assertions (Br, pp 10-11) regarding defendants' alleged "changing positions" in this case. Petitioners' characterization of these alleged "changing positions" plays fast and loose with the facts in the record and indeed refers to facts outside of the record. The State defendants had consistently maintained that New York was not constitutionally required to pay refunds because, under the principles of the retroactivity doctrine and remedial law, neither federal nor state law

requires refunds where there had been longstanding, good faith reliance on the validity of its prior tax law and the fiscal burden of such refunds would be too great. In connection with this argument, respondents had asserted that due process is satisfied because taxpayers, under New York law, have a meaningful opportunity to challenge the tax in an action for declaratory and/or injunctive relief prior to payment of the taxes.

Moreover, the State respondents have never departed from their position that, even if federal and state law requires backward-looking relief in this case, only those taxpayers who have filed timely individual claims for refunds with the New York State Department of Taxation and Finance would be entitled to refunds. This is consistent with the longstanding statutory provisions found at sections 686 and 687 of the New York Tax Law. In this regard, the Court's decision of December 6, 1994 in *Reich v. Collins*, ____ US ____ (No. 93-908), has no implications whatsoever for this case.

ARGUMENT

POINT I

THE APPELLATE DIVISION FULLY COMPLIED WITH THE MANDATE OF THE COURT TO RECONSIDER ITS PRIOR DECISION IN LIGHT OF *HARPER*.

Petitioners' assertion that the decision below flouts this Court's mandate is flatly wrong and provides no basis for granting a writ of certiorari. The Appellate Division's decision and order of August 8, 1994, reflects no misunderstanding or flouting of the United States Supreme Court's order

and mandate remitting the case for "further consideration in light of *Harper*". Furthermore, in the Appellate Division's prior decision of January 15, 1992, it had rejected petitioners' arguments regarding § 1983 relief, class certification and common fund attorneys' fees based on well-settled principles of federal and state law independent of the remedial issues addressed in *Harper*. The Appellate Division correctly concluded that *Harper* did not alter these well-settled principles of law and that there was no need to reexamine those aspects of its prior decision.

This Court's decision in *Harper* basically addressed two issues. First, the Court's principal holding was that the federal rule against the use of selective prospectivity requires as a matter of federal choice law of principles that *Davis v Michigan Department of Treasury*, 489 US 803 (1989), be applied retroactively. *Harper*, 113 S Ct at 2516-18, 125 L Ed 2d at 84-87. The Court also rejected Virginia's argument that its state court decision rested on the independent state retroactivity principles explaining that the Virginia court had rested its decision on *Davis*. The Court did not rule, however, that the State could not deny relief based on other independent state or federal grounds.

Indeed, the Court expressly recognized that the State could deny refunds: "We do not enter judgment for [the taxpayers], however, because federal law does not necessarily entitle them to a refund. Rather, the Constitution requires Virginia 'to provide relief consistent with federal due process principles'". 113 S Ct at 2519, 125 L Ed 2d at 88. In particular, the Court reaffirmed its holdings in *American Trucking Assns., Inc. v Smith*, 496 US 167 (1990), and *McKesson Corp. v Division of Alcoholic Beverages & Tobacco*, 496 US 18, 39-40 (1990), that if a state offers a meaningful opportunity for taxpayers to withhold their contested tax assessments and to challenge their validity in a

predeprivation hearing due process does not require the State to offer post-deprivation relief. *Harper*, 113 S Ct at 2519-20, 125 L Ed 2d at 88-89. The Court, therefore, remanded the case to the Virginia courts to determine whether Virginia provided an adequate predeprivation remedy and to craft an appropriate remedy accordingly. 113 S Ct at 2520, 125 L Ed 2d at 89. The Court in *Harper* did not make even the mildest allusion to issues such as class certification, attorneys' fees, or traditional prerequisites to relief under 42 USC § 1983.

Petitioners argue (Br, pp 12-13) that because they included two "Questions Presented" in their application for the writ in *Duffy I*, the first being whether *Davis* must be applied retroactively, and the second being "[w]hether an action brought under 42 USC § 1983 in a state court may be defeated by the assertion of state procedural and substantive defenses, where such defenses would not be available if the action had been brought in a federal forum", this Court's mandate vacating the Appellate Division's order and remitting it for further consideration required that court to reconsider expressly all aspects of its prior decision. Petitioners, however, ignore the phrase in the mandate remanding the case for further reconsideration "in light of *Harper*" (Pet App 45a). Furthermore, in the text of their prior petition explicating the proposed question presented (pp 22-23), petitioners asserted that the Appellate Division's decision with regard to the § 1983 cause of action and class certification conflicted with *Hafer v Melo*, 502 US 21 (1991) (holding that a state official acting in his or her official capacity can be held personally liable under 42 USC § 1983); *Howlett v Rose*, 496 US 356 (1990) (holding that school board could not assert state law sovereign immunity defense to defeat § 1983 claim) and *Felder v Casey*, 487 US 131 (1988) (holding that notice-of-claim provision of state law could not be used to defeat federal rights in a non-tax case).

Aside from the fact that these alleged conflicts may not have even been "fairly included" within the second "Question Presented," *see*, Supreme Court Rule 14.1(a); Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, 7th ed., pp 338-339, this Court did not remand the case for further consideration in light of *Hafer*, *Howlett* or *Felder*. It did so only "in light of *Harper*" (Pet App 45a). Additionally, the issue of common fund attorneys' fees was nowhere addressed in either the petition for certiorari or the *Harper* decision.

Thus, the Appellate Division on remittitur for further consideration in light of *Harper* was required to consider the issues of remedy and the adequacy under the Due Process Clause of the State's predeprivation procedures if the refunds could be denied under State law. There was no directive requiring it to reconsider the other aspects of the decision which rested on independent grounds as they were wholly unaffected by *Harper*. This is not to say that the Appellate Division could not have reconsidered any or all aspects of its prior decision; simply, it was not required to do so. In sum, the Appellate Division did not contravene this Court's mandate.

POINT II

THE APPELLATE DIVISION CORRECTLY DECIDED THE ISSUES RELATED TO PETITIONERS' RIGHT TO RELIEF UNDER 42 USC § 1983 BASED ON WELL-SETTLED PRINCIPLES OF FEDERAL LAW. ITS DECISION IN THIS REGARD PROVIDES NO BASIS FOR GRANTING THE WRIT.

The Appellate Division in its January 15, 1992 decision had upheld the trial court's dismissal of petitioners' cause of action under 42 USC § 1983 on the ground that (1) an action

for damages may not be maintained against the State of New York or the State respondents in their official capacities; and (2) petitioners failed to show how any of the named respondents were personally involved in the collection and assessment of their personal income taxes and that the fact that they were or are in a high position is insufficient to impose personal liability. *Duffy I* (Pet App 22a-23a, 174 AD2d at 266, 579 NYS2d at 692, *affg*, 148 Misc 2d at 468-69, 555 NYS2d at ____). Additionally, the court observed "that the defense of qualified immunity, which the [trial] court did not reach * * * provided a much simpler basis on which to reject the claims." *Duffy I*, Pet App 22a, 174 AD2d at 266, 579 NYS2d at 692. The court went on to state the clearly established principle that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, quoting, *inter alia*, *Harlow v Fitzgerald*, 457 US 800, 818 (1982). Indisputably, the Appellate Division's decision, resting as it did on principles of Eleventh Amendment and qualified immunities and the role of respondeat superior in § 1983 actions were not in any way implicated by *Harper*.

The claim against the State defendants in their official capacities was correctly dismissed. In *Will v Michigan Department of State Police*, 491 US 58, 71 (1989), this Court pronounced that with respect to a suit for retroactive relief[5]

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[5]Because the State of New York immediately conformed its Tax Law and the corresponding provisions of the City's Administrative Code to *Davis*, L 1989, ch 664, petitioners here cannot argue that they are seeking prospective relief under § 1983. The new law became effective for the tax year beginning January 1, 1989. *Davis* was decided on March 28, 1989.

"neither a State nor its officials acting in their official capacities are 'persons' under § 1983". Moreover, Eleventh Amendment jurisprudence precludes a suit against the State or State officials which will result in a retroactive award of monetary damages paid from the State treasury, even where plaintiffs attempt to style their claim otherwise. *See, Green v Mansour*, 474 US 64, 73 (1985); *Pennhurst State School & Hosp. v Halderman*, 465 US 89 (1984); *Edelman v Jordan*, 415 US 651, 663, 667-69 (1974).

To the extent that petitioners' section 1983 claim seeks damages against defendants in their individual capacities, it is well established that defendants cannot be held individually liable absent personal involvement in the alleged deprivation. There was no personal involvement on the part of defendants in any alleged wrongdoing against these plaintiffs. Each of these plaintiffs submitted self-assessing personal income tax returns and voluntarily paid their taxes during the years in question. Aside from the mere processing of these returns and payments, there was no involvement whatsoever of anyone from the State, let alone these defendants, in collecting or assessing taxes on plaintiffs' Federal pensions. Nor could defendants having participated in the denial of any refund claims submitted by plaintiffs, since plaintiffs did not file claims with the Department of Taxation and Finance until long after commencement of this action. Furthermore, defendant Regan, as head of the New York Department of Audit and Control, was authorized under state law to issue tax refunds only upon certification of the Commissioner of Taxation and Finance. Tax Law § 686. No such certification had been made with regard to refunds for taxes paid on federal pensions.

Petitioners' reliance (Br, pp 15-16) on *Hafer v Melo*, 502 US 21 (1991), where this Court held that a state official may in some circumstances be held personally liable for damages under 42 USC § 1983 even for actions taken in his or her official capacity, is misplaced. As discussed above, the Appellate Division did not in any way rely on principles inconsistent with the *Hafer* ruling in determining that defendants were not personally involved.

The Appellate Division properly held that respondents would, in any event, be protected under the doctrine of qualified immunity. More than a score of states had similar laws, many in effect for some fifty years before the Supreme Court issued its ruling in *Davis*. *Davis* was clearly a case of first impression; there had been no prior judicial ruling in the federal or state courts that similar tax provisions violated the doctrine of intergovernmental tax immunities. Indeed, in addition to New York's appellate court, several other courts in *Davis*-related cases have also ruled that the tax officials are protected by qualified immunity. *See, e.g., Swanson v Powers*, 937 F2d 965 (4th Cir 1991), *cert. denied*, ____ US ____, 112 S Ct 871, 116 L Ed 2d 777 (1992); *Brumley v Utah State Tax Commn.*, 868 P2d 796, 800-801 (1993); *Bohn v Wadell*, 164 Ariz 74, 790 P2d 772 (Ariz Tax 1990), *vacated on other grnds*, 174 Ariz 239, 848 P2d 324 (1992), *cert. denied*, ____ US ____, 113 S Ct 3000, 125 L Ed 2d 693 (June 21, 1993). Again, the Appellate Division's decision in this regard involves a straightforward application of settled principles of the federal law of qualified immunity.

POINT III

THE APPELLATE DIVISION CORRECTLY DECIDED THE ISSUE OF PETITIONERS' APPLICATION FOR CLASS CERTIFICATION AND COMMON FUND ATTORNEYS' FEES BASED ON WELL-SETTLED PRINCIPLES OF STATE LAW WHICH IN NO WAY CONFLICT WITH DECISIONAL LAW OF THE UNITED STATES SUPREME COURT.

The Appellate Division held that the trial court had properly denied petitioners' application for class certification, writing (Pet App 22a, 174 AD2d at 266, 579 NYS2d at 692):

> "It is well settled that class action certification is inappropriate in a case such as this where governmental actions are involved and subsequent plaintiffs will be adequately protected under the doctrine of stare decisis" (*Duffy v Wetzler*, 148 Misc 2d 459, 464, *supra*, citing *Matter of Crociata v State Tax Commn.*, 133 Misc 2d 855, *affd* 134 AD2d 112, *affd* 73 NY2d 726; *Conklin v Town of Southampton*, 141 AD2d 596). Nothing in the record at bar justifies a departure from this rule.

The Appellate Division's decision based solely on state law[6] was unaffected by *Harper* which in no way dealt with the issue of class certification. The Supreme Court's remittitur in this case for further consideration in light of *Harper* clearly did not require or even warrant reconsideration of the class certification aspect of the decision.[7]

[6]Under New York Civil Practice Law and Rules § 901(a)(5), a class action may be certified only if "a class action is superior to other available methods for the fair and efficient adjudication of the controversy". As a rule, a class action will not be the superior method where governmental operations are involved and where subsequent petitioners will be adequately protected under the principle of stare decisis. *Rivers v Katz*, 67 NY2d 485, 499, 504 NYS2d 74, 81, 495 NE2d 337, 344 (1986); *Matter of Martin v Lavine*, 39 NY2d 72, 75, 382 NYS2d 956, 957, 346 NE2d 794, 795 (1976); *Matter of Jones v Berman*, 37 NY2d 42, 57, 371 NYS2d 422, 432-433, 332 NE2d 303, 311 (1975); *Matter of Rivera v Trimarco*, 36 NY2d 747, 749, 368 NYS2d 826, 827, 329 NE2d 661, 661-662 (1975); *Gonzalez v Blum*, 96 AD2d 1091, 1092, 467 NYS2d 58, 59 (2d Dept 1983); *Matter of Crociata v State Tax Comm'n*, 133 Misc 2d 855, 857, 508 NYS2d 842, 843 (Sup Ct Albany Co 1986), *affd on other grounds*, 134 AD2d 112, 523 NYS2d 923 (3d Dept), *affd*, 73 NY2d 726, 535 NYS2d 592, 532 NE2d 98 (1988). New York law is clear that class action certification is particularly inappropriate in a lawsuit seeking to establish a right to tax refunds because such a claim is "personal to the taxpayer" and those who fail to file a protest or, in this case, a claim for a refund may not enhance their right to a refund through the use of a class action. *See, Brady v State of New York*, 172 AD2d 17, 25, 576 NYS2d 896, 900 (3d Dept 1991), *affd on other grounds*, 80 NY2d 596, 592 NYS2d 955, 607 NE2d 1060 (1992), *cert. denied*, ____ US ____, 113 S Ct 2998, 125 L Ed 2d 692 (1993); *Gandolfi v City of Yonkers*, 101 AD2d 188, 198-199, 475 NYS2d 429, 435-436 (2d Dept 1984), *affd*, 62 NY2d 995, 479 NYS2d 517, 468 NE2d 699 (1984); *Garden City Center Assoc. v Board of Assessors*, 153 AD2d 667, 669, 545 NYS2d 184, 186 (2d Dept 1989), *appeal dismissed*, 75 NY2d 805, 552 NYS2d 104, 551 NE2d 597 (1990).

[7]Virginia does not have a class action statute and the issue whether class relief is necessary was never raised before the Supreme Court in *Harper*.

Petitioners' argument (Br, pp 19-23) that the failure to award class certification conflicts with the United States Supreme Court's mandate because it provides a total procedural obstacle to the vindication of federal rights is wholly without merit. The Supreme Court in *Harper* clearly reaffirmed that, so long as a State's procedures satisfy due process, failure to comply with them can provide a complete defense to refund claims, *citing*, *McKesson Corp. v Division of Alcoholic Beverages & Tobacco*, 496 US 18, 39-40. In *McKesson*, the Court had held that where a state has given an individual taxpayer a meaningful opportunity to challenge a tax prior to payment, it need not provide post-deprivation relief at all. The Court wrote, in answer to the States' concerns regarding their legitimate interest in sound fiscal planning, "in the future, States may avail themselves of a variety of procedural protections against any disruptive effects of a tax scheme's invalidation, such as providing by statute that refunds will be available to only those taxpayers paying under protest, or enforcing relatively short statutes of limitations applicable to refund actions." *McKesson*, 496 US at 50. This holding is determinative of plaintiffs' argument that the Supremacy Clause requires that class certification be granted to protect those who had not filed administrative claims for refunds within the relatively long three-year statute of limitations contained in section 687 of the New York Tax Law.

Petitioners' reliance (Br, pp 22-23) on *Felder v Casey*, 487 US 131 (1988), which held state notice-of-claim provisions inapplicable to § 1983 actions, is misplaced. That was not an action for a tax refund. The Supreme Court in *McKesson* has expressly sanctioned the requirement that a taxpayer file an individual protest or claim even under a short statute of limitations. The point is that, here, plaintiffs

commenced this action in state court, not federal court, and the State has the "unassailable" right to "establish the rules of procedure governing litigation in their own courts" so long as they do not effectively defeat federal rights. *Felder*, 487 US at 138. In light of *McKesson*, it cannot be said that the rejection of the use of the class action mechanism to obviate the administrative procedures required to be followed under state law effectively defeats any federal rights.

In any event, we note that as a procedural matter the issue whether the class action mechanism can be used to toll the statute of limitations is not properly before this Court because petitioners have waived that issue. Petitioners did not challenge that part of the order and judgment of New York Supreme Court, Queens County, which awarded a declaration that taxpayers are entitled to a refund of that portion of their personal income taxes which was paid on federal pension benefit for the years 1986 through 1988, "provided that they file for a refund and meet the procedural requirements for a refund under the tax law" (Pet App 43a). Petitioners' notice of appeal to the Appellate Division expressly limited their appeal from that order and judgment to those aspects that dismissed their claims under § 1983 and for monies had and received and denied their class certification issue. *See*, Record on Appeal to Appellate Division, Docket No. 90-800, pp 7-8. The appeal on the class certification issue cannot be used to enlarge the substantive rights granted by the trial court absent an appeal of the decision on the substantive rights.

Petitioners also erroneously argue that their inability to obtain attorneys' fees under the common fund doctrine deprived them of meaningful backward-looking relief required by the Constitution. The Appellate Division correctly

affirmed the post-judgment order of Supreme Court, Queens County, denying petitioners' attorneys' post-judgment motion for attorneys' fees under the common fund doctrine. The rule in New York, as it is throughout the United States, is that parties are ordinarily required to bear their own costs in litigation. *Alyeska Pipeline Serv. Co. v Wilderness Society*, 421 US 240, 247-259 (1975); *Mighty Midgets, Inc. v Centennial Ins. Co.*, 47 NY2d 12, 21-22, 416 NYS2d 559, 563-564, 389 NE2d 1080, 1084 (1979); *Feeney v Licari*, 131 AD2d 539, 516 NYS2d 265 (2d Dept 1987). Although the judicially created doctrine of common fund attorneys' fees has been used in New York, it has been done only sparingly under narrow circumstances not present in this case.

Here, the key prerequisites for granting common fund attorneys' fees are missing. First, there is no common fund over which the courts have jurisdiction. This is an action for declaratory and injunctive relief; petitioners' may obtain refunds from the State treasury through the filing of administrative claims under section 687 of the Tax Law. Additionally, the common fund doctrine authorizes attorneys' fees only to the extent that the recipients of an award benefit from the attorneys' efforts. Here, the vast majority of the administrative refund claims that have been filed were filed independently, some before this lawsuit was even commenced. These taxpayers are the beneficiaries largely of the efforts of the attorneys who litigated *Davis* and *Harper*, more so than the efforts of the attorneys in this case.

What petitioners' arguments boil down to is that there is a constitutional requirement that the State of New York provide for attorneys' fees in taxpayers' refund actions. This argument is ludicrous. Taxpayers are clearly not precluded

from redress for alleged constitutional injuries merely because there is no state law mechanism for attorneys' fees. This case illustrates by example that redress can be pursued without authorization for attorneys' fees. In addition to the four plaintiffs whom they represent in this action, approximately 650 named plaintiffs are represented by the same counsel in *Alderman v Wetzler*, No. 6193/91 (Sup Ct NY Co), an action raising precisely the same issues which is being held in abeyance in New York County Supreme Court pending the resolution of this case. Presumably, counsel has a fee arrangement with each of these individuals.

In sum, petitioners' argument that their inability to obtain class certification and common fund attorneys' fees denies them meaningful backward-looking relief is wholly meritless. That argument does not provide a basis for granting a writ of certiorari.

CONCLUSION

THE WRIT SHOULD BE DENIED.

Dated: Albany, New York
December 8, 1994

Respectfully submitted,

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